Office - Supreme Court, U. S.
FILED
AUG 11 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 201

FRANK KUCHIN,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

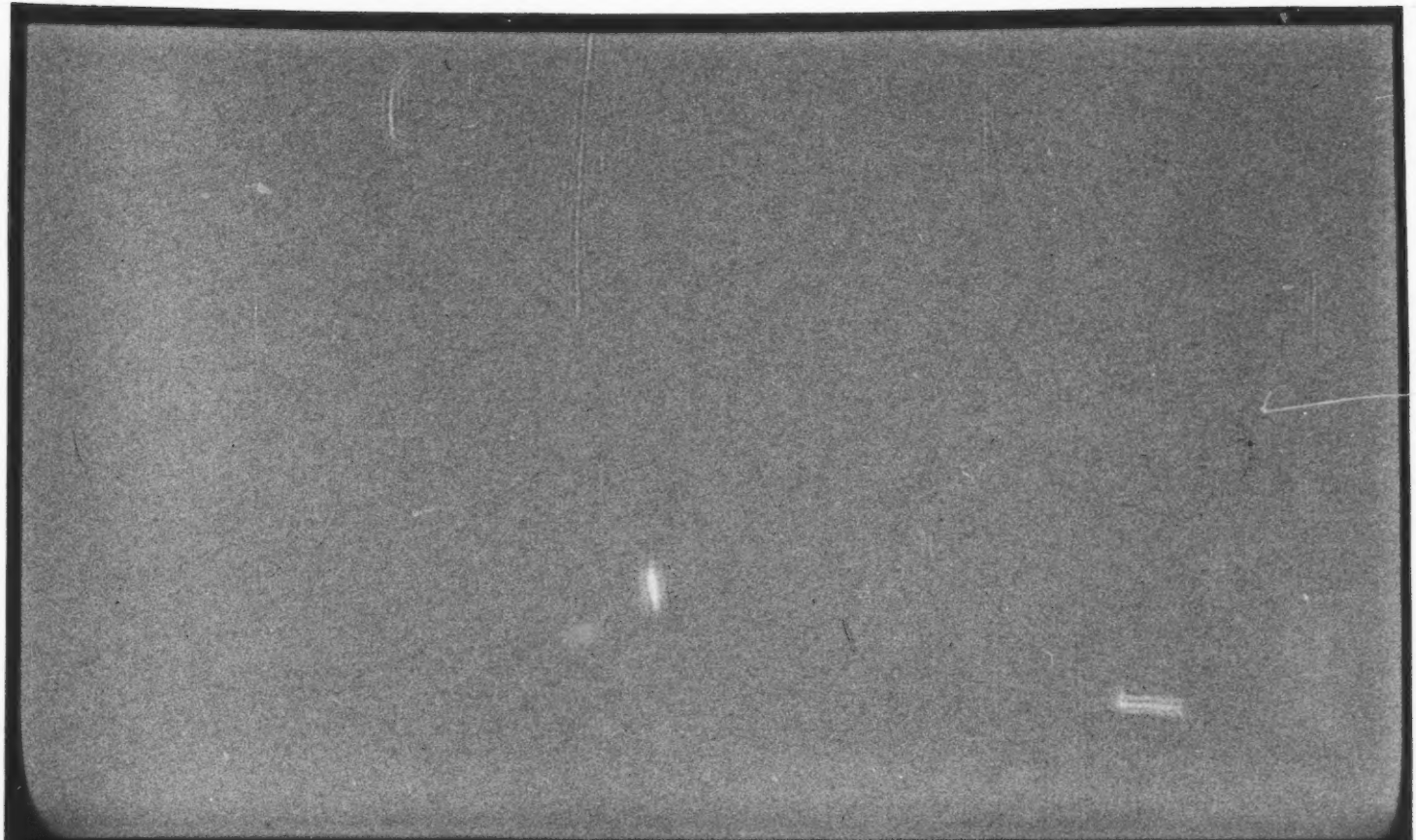
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OTIS LOWELL HASTINGS,
DERNHAM J. SLATER,
GERALD M. CHAPMAN,
400 West Madison Street,
Chicago 6, Illinois,
DEarborn 2-2121.
Attorneys for Respondent.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago.
Telephone: Financial 6-2966



INDEX.

	PAGE
Questions Presented	2
Statement of the Case	3
Summary of Argument	6
Argument	8
I. Petitioner advances no logical reason for disturbing the holding of the Court of Appeals that petitioner failed to prove any actionable negligence	9
II. The Court of Appeals correctly applied the established principles of Illinois law governing *res ipsa loquitur*	12
III. Petitioner has shown no grounds for invoking the certiorari jurisdiction of this Court	17
Conclusion	20
Appendix "A"	21
Appendix "B"	25

AUTHORITIES CITED.

Cases.

Ackermann v. Hicks, 7 Cir. 193 F. 2d 345 22
Adamsen v. Magnelia, 280 Ill. App. 418, 425 15
Barrett v. Chicago & N. W. Ry. Co., 207 F. 2d 5 22
Billman v. Kroger Co., 185 F. 2d 120 22
Bollenbach v. Bloomenthal, 341 Ill. 539, 173 N.E. 670 .. 13
Bradley v. Lake Shore and M. S. Ry. Co., 238 Pa. 315, 86 A. 200 11
Carter v. John Henner Trucking Co., 210 F. 2d 443 24
Chicago and E. I. R. R. Co. v. Reilly, 212 Ill. 506, 72 N.E. 454 ..... 7, 10, 13
Chicago City Ry. Co. v. Pural, 224 Ill. 324, 79 N.E. 833 12
Chicago Title and Trust Co., Administrator v. Chicago and E. I. R. R. Co., 167 Ill. App. 231 aff'd. 255 Ill. 294, 99 N.E. 634 11
Chicago Union Traction Co. v. Newmiller, 215 Ill. 383, 74 N.E. 410 12
Colas v. Grzegorek, 207 F. 2d 705 24
Cox v. Kroger Co., 179 F. 2d 382 21
Desch v. United States, 186 F. 2d 623 24
Desper v. Starved Rock Ferry Co., 188 F. 2d 177, aff., 342 U. S. 187, reh. den., 342 U. S. 934 23
Drinan v. A. J. Lindemann & Hoverson Co., 202 F 2d 271 24
Ernst v. Jewel Tea Co., 197 F. 2d 881, cert. den., 344 U. S. 918 21
Estate of Spiegel v. Commissioner, 335 U. S. 701 9

Fiedler v. Chicago & N. W. Ry. Co., 204 F. 2d 515 23
Franklin v. Missouri K. & T. Ry Co. of Texas (Tex. Civ. App.), 221 S.W. 2d 918 11
Frazier v. Sims Motor Transport Lines, Inc., 196 F. 2d 914 24
General Insurance Co. v. Pathfinder Petroleum Co., (9th Cir.), 145 F. 2d 368 13
General Pictures Co. v. Electric Co., 304 U. S. 175 17
Griffy v. Havey, 201 F. 2d 501 22
Grivas v. Parmelee Trans. Co., 207 F. 2d 334, cert. den., 347 U. S. 913 24
W. E. Hedger Transportation Corp. v. Ira S. Bushby & Sons (2d Cir.), 155 F. 2d 321 13
Heller v. Select Lake City Theatre Operating Co., 187 F. 2d 649 ..... 23, 24
Hill v. Railway Express Agency, 187 F. 2d 184 23
Hillsborough v. Cromwell, 326 U. S. 620 9
Hoff v. Donaldson, 184 F. 2d 419 21
Hynes v. Indian Trails, 181 F. 2d 668, cert. den., 340 U. S. 824 24
I. C. R. R. Co. v. Bailey, 222 Ill. 480, 70 N.E. 833 12
Jackson v. 919 Corporation, 344 Ill. App. 519, 101 N.E. (2d) 594 15
Koch v. Chicago & N.W. Ry. Co., 208 F. 2d 152 22
Koehler v. United States, 200 F. 2d 588 24
Leach v. Maryland Casualty Co., 183 F. 2d 43 24
McGilvray v. Powell 700 North, 186 F. 2d 909 24
McGunegill v. Chesapeake & O. Ry. Co., 199 F. 2d 302 22
Magnum Co. v. Coty, 262 U.S. 159 17
Marion Steam Shovel Co. v. Bertino (8th Cir.), 82 F. 2d 945 12

Matsumoto v. Chicago & N.W. Ry. Co. (7th Cir.), 168 F. 2d 496 12
Mattison v. Brown, 197 F. 2d 414 24
Mead v. Cochran, 184 F. 2d 579 24
Musto v. Lehigh Valley R.R., 327 Pa. 35, 192 A. 888 17
Nattens v. Groiler Society, 195 F. 2d 449 23
New York, Chicago & St. Louis R. Co. v. Blumenthal, 160 Ill. 40, 43 N.E. 809 12
Norling v. Carr, 211 F. 2d 897 24
O'Keefe v. Wabash R.R. Co., 185 F. 2d 241, cert. den., 341 U. S. 921 21
Olson v. Chicago Transit Authority, 1 Ill. 2d 83, 115 N.E. 2d 301 19
Omaha Packing Co. v. Pittsburgh, F.W. & C. Ry. Co., 120 F. 2d 594 13
Pearson v. Baltimore & Ohio R. Co., 200 F. 2d 569 24
Petermichl v. Chicago & N.W. Ry. Co., 205 F. 2d 434, cert. den., 346 U.S. 916 22
Plummer v. Spence, 182 F. 2d 958 24
Propper v. Clark, 337 U.S. 472 9
Quirk v. New York, C. & St. L. R. Co., 189 F. 2d 97, cert. den., 342 U. S. 871 22
Ramsel v. Ring, 173 F. 2d 41 12
Reeder v. Tosh, 187 F. 2d 10 24
Reilly v. Chicago & N. W. Ry. Co., 201 F. 2d 473, cert. den., 345 U. S. 997 22
Repsholdt v. U. S., 205 F. 2d 852, cert. den., 346 U. S. 901 21
Reynolds v. Baltimore & O. R. Co., 185 F. 2d 27, cert. den., 340 U. S. 947 21

Schroeder v. Minneapolis, St. Paul & S.S.M. R. Co., 204 F. 2d 758 23
Simmons v. South Shore Hospital, 340 Ill. App. 153, 91 N.E. (2) 135 15
Spikings v. Wabash R. Co., 201 F. 2d 492, cert. den., 345 U. S. 992 ..... 19, 22
Stewart v. United States, 186 F. 2d 627, cert. den., 341 U. S. 940 24
Stewart v. United States, 199 F. 2d 517 24
Stephens v. Sears, Roebuck & Co., 221 F. 2d 260 23
Swigart v. Chicago & N. W. Ry. Co., 180 F. 2d 177 22
Tillman v. Great American Indemnity Co. of New York, 207 F. 2d 588 24
Wadiak v. Illinois Central R. Co. (7th Cir.), 208 F. 2d 925 ..... 16, 21
Wendell v. Chicago, R. I. & P. R. Co., 184 F. 2d 868 21
Wetherbee v. E. J. & E. R. Co., 204 F. 2d 755, cert. den, 346 U. S. 867 22
White v. United States (9th Cir.), 193 F. 2d 505 12
Woodworkers Tool Works v. Byrne (9th Cir.) 191 F. 2d 667 12
Wm. Wrigley, Jr. Co. v. Standard Roofing Co., 325 Ill. App. 210, 59 N.E. 2d 510 15

RULES.

Federal Rule of Civil Procedure 43(a) 12

EXHIBITS

No. 7 27
No. 16 29

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No. 201

FRANK KUCHIN,

Petitioner,

VS.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Brief For Respondent in Opposition.

The petition contains the facts establishing this Court's jurisdiction and the citation to the only written opinion in this cause (Ptn. 2).

Questions Presented.

1. Under Illinois law, is a plaintiff entitled to recover damages for personal injuries merely by proving that as he walked beside a moving freight train he was struck by an unidentified iron rod protruding from the side of a box car?

It is well settled Illinois law that negligence may not be inferred from the mere fact that an accident occurred; facts evincing a lack of due care are required. Under the Illinois decisions, such facts are totally absent from this record.

2. Is the doctrine of *res ipsa loquitur* applicable where (a) the occurrence complained of is equally explicable on a hypothesis of pure accident, (b) where specific evidence of the cause of the accident has been introduced by petitioner, and (c) where the doctrine is relied on for the first time after an unfavorable decision of the Court of Appeals?

The applicable Illinois decisions prohibit the application of the doctrine of *res ipsa loquitur* to the facts in this case. The rules of appellate review prohibit asserting a new theory after a decision by the Court of Appeals.

3. Does the Court of Appeals for the Seventh Circuit misconceive the function of a federal reviewing court?

Neither the decision herein nor the collection of random and inaccurate citations contained in the petition indicate any such misconception.

Statement of the Case.

This case was determined below on the hypothesis that petitioner was struck by a loose bleeder rod protruding from the side of one of the cars of a train operated by respondent (R. 204-208). To assist in visualizing the situation, respondent has reproduced defendant's Exhibit 7 (R. 75) and a portion of defendant's Exhibit 16 (R. 112, 75) in Appendix B of this brief. Defendant's Exhibit 7, a photograph, shows the outside end and curved handle of a bleeder rod extending through an "I" bolt located below the side door of a box car. It will be noted that no part of this bleeder rod extends laterally as far as the outside of the track on which the car door rides. Defendant's Exhibit 16 is a blueprint showing the brake arrangement on a freight car similar to those in the train involved. The portion reproduced, called the crossbearer section, shows the part of the brake equipment under the center of the car, including the air brake pipes, the reservoir tank and the bleeder rods. Examination of this blueprint will show that the cotter keys by which the two bleeder rods are connected to the bleeder valve are located on top of the reservoir tank, just below the floor.

By means of selective reproduction of portions of the Court of Appeals' statement of facts, plaintiff conveys a surface impression of objectivity. However, a wholly different picture is conveyed by an examination of the entire opinion.

The language of the opinion omitted between the first and second quotations appearing on page 5 of the petition is as follows:

> "The plaintiff did not mention that he had been struck in the back until several days later and no person other than the plaintiff saw any object such

as he described, either before the accident or afterwards. Nothing of the sort was noticed by members of the crew when the train was being made up in the yards, nor by various persons, including the police, the yardmaster, and crew members, who gathered about the scene of the accident right after it happened. Nor was anything of the sort revealed by an inspection of the cars the next day."

In summarizing the holding of the Court of Appeals, petitioner elects to omit the following significant language, occuring directly after the long extract set forth on page 7 of the petition:

"The plaintiff makes the further contention that the projecting bleeder rod was plainly visible, and that, therefore, it should have been observed by members of the defendant's crew. The plaintiff said he first saw the rod 'sticking out' when the car from which it was projecting was six or seven car lengths south of the place where he was struck; that he 'saw it as soon as he got hit.' However, there is no indication as to how long the offending rod had been in that position. Neither is there any showing that members of the crew were so situated that they should have seen it irrespective of how long the condition had existed. No one would seriously contend that they were under an absolute duty to observe instantly every irregularity in the equipment regardless of its nature. To say that the train men should have seen the projecting rod and have avoided the accident, for no other reason than that the plaintiff saw it afterwards, is not a sufficient basis to support a reasonable inference of negligence."

Petitioner likewise passes over the following portion of the opinion of the Court of Appeals indicating that petitioner waived the application of the doctrine of *res ipsa loquitur:*

"We need not consider whether the plaintiff here could properly invoke the doctrine of *res ipsa loquitur.*

> He has not only introduced expert testimony tending to show the precise cause of the injury, which precludes the application of that doctrine, see *Omaha Packing Co.* v. *Pittsburgh F. W. & C. Ry. Co.*, 7 Cir., 120 F. 2d 594, *but he has also expressly declined to rely on that doctrine''* (emphasis supplied).

In implying some sinister significance to the failure of the Court of Appeals to refer to the testimony regarding a bad order car (Ptn. 7), petitioner neglects to call attention to the following testimony by his rebuttal witness, Drahos (R. 105-6):

> "The cars will couple properly without the draft key. The key can be gone and it won't interfere with pulling the car. I would not consider that as a safety appliance.
>
> "I had not bad-ordered the car in the train yard. Our records show that it had been marked bad-order. We send cars down to industries to be loaded and then when we get them back on the way to be unloaded we service them to keep from delaying the car. As to whether a car is pulled out of service when it is in bad order, it all depends on the kind of defect it is. If there is something that can't run it is tied up. If it is a penalty defect the car is taken out of service and repaired before it is switched any further."

The fact that a penalty defect was not involved is clear from the fact that on the trial petitioner abandoned the count of his complaint based upon the Safety Appliance Act (R. 121).

The statement at page 8 of the petition that evidence with respect to the inspection of these cars was in the exclusive possession of respondent is wholly unrealistic in view of the discovery provisions of the Federal Rules of Civil Procedure. Immediately following that statement petitioner comments on what may cause a bleeder rod to

protrude. Counsel ignores the testimony of his own expert, O'Hara, who testified as follows (R. 110):

> "When you pull on bleeder rods sometimes they come loose. They are only held to the bleeder valve with a cotter key. Vibration wears the key out. So does rust and natural deterioration. If you pull on it real hard you may break the cotter key. If you do, you pull the bleeder rod out as far as it will go. The cotter key is standard and I believe is specified by the Association of American Railroads. You cannot see the cotter key from the outside. You must look under the car. You are not able to tell the condition of the cotter key by making an inspection. As to whether there is any way to tell when the cotter pin is going to come loose, I would say that we make a specific inspection of it. I can order its inspection. These inspections are made periodically * * * It is possible that from once a year inspection there might be some vibration or wearing or something of the sort of the cotter key that nobody using a freight car could determine."

Summary of Argument.

The only issue for this Court is whether petitioner proved either a general or specific allegation of negligence that defendant carelessly struck plaintiff with an iron bar protruding from one of its cars. Because the determination of this issue is one of local law which would not justify certiorari, petitioner makes the charge that the Court of Appeals for the Seventh Circuit has misconceived its function.

Petitioner's argument that negligence could be inferred from failure to discover a defective cotter key ignores his own evidence that a defective cotter key cannot be discovered by routine inspection, that it may fail because of vibration, rust or wear, and that a cotter key is usually

good for about a year, thus requiring only annual inspections. The record is silent with respect to the practice of defendant in inspecting cotter keys. The only facts established are that the cars were given a routine inspection before they left the Waukegan yard and that petitioner was struck by a protruding bleeder rod. Under *Chicago & E. I. R. R. Co.* v. *Reilly*, 212 Ill. 506, 72 N.E. 454, this does not constitute a showing of negligence, since there is no evidence indicating lack of due care on the part of the respondent. Other authorities support this position.

Recognizing this failure of proof, plaintiff invokes the doctrine of *res ipsa loquitur* for the first time in this Court, despite his express refusal to rely upon it in the Court of Appeals. The applicability of the doctrine is a matter to be determined by state law in a diversity case; under the *Reilly* case and other Illinois authorities, the doctrine cannot be applied, since evidence was introduced to show the cause of the accident, and it is equally plausible that the cotter key might have snapped at some time between the time the train left the Waukegan yard and the time plaintiff was injured.

Petitioner contends that the Court of Appeals has misconceived its function in the review of personal injury cases. This contention is not a basis for certiorari, since the only fact relied upon to support it is petitioner's assertion that various cases decided by that circuit have resulted in reversals of favorable findings for plaintiffs. His statistical study is wholly inaccurate and his comparison with the attitude of Illinois courts wholly irrelevant.

Argument.

Should this Court grant the petition, the only issue which can be presented is whether petitioner proved the allegations of his complaint designated "(a)" and "(c)". Those allegations are as follows (R. 4):

> "(a) Carelessly and negligently operated its freight train in a southerly direction so that the same struck plaintiff;
>
> "(b) Carelessly and negligently failed to keep a proper lookout for persons walking along the aforesaid pathway;
>
> "(c) Carelessly and negligently struck the plaintiff with an iron bar which was then and there protruding from one of its cars as he was walking on the aforesaid pathway;
>
> "(d) Carelessly and negligently operated in its train of cars in service a car with a defective draft key."

Subparagraph "(b)" was withdrawn by order of the Court at the conclusion of all the evidence (R. 9). Under Rule 23(c) of this Court, petitioner has abandoned any claim with regard to subparagraph "(d)", since in his questions presented, he does not take issue with the finding of the Court of Appeals that the evidence "shows conclusively that a draft key, or the absence of one, could not, in any rationally conceivable manner, have been responsible for the plaintiff's injury."

Petitioner attacks the holding of the Court of Appeals with respect to the two remaining subparagraphs ["(a)" and "(c)"] on the basis that there was evidence from which negligence could be inferred, and that the doctrine of *res ipsa loquitur* was applicable. Since the jurisdiction of the United States District Court rested solely upon

diversity of citizenship (R. 1-3), these questions are matters of local law and will not, by themselves, elicit certiorari, *Propper* v. *Clark*, 337 U. S. 472, 486; *Hillsborough* v. *Cromwell*, 326 U. S. 620, 630; *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707-708. To avoid this result petitioner contends the Court of Appeals for the Seventh Circuit misconceives its function in the review of personal injury cases.

I.

Petitioner advances no logical reason for disturbing the holding of the Court of Appeals that petitioner failed to prove any actionable negligence.

Petitioner's obscure argument that facts existed from which negligence could be inferred appears to be that inspection will disclose defects in bleeder rod appurtenances and that properly adjusted rods do not protrude beyond the side of the car (Ptn. 11-12). Petitioner's counsel does not disagree with the conclusion of the Court of Appeals that there was no "absolute duty (on the part of the crew) to observe instantly every irregularity in the equipment regardless of its nature." He contends that the assumed bleeder rod defect should have been discoverable through the use of ordinary care, simply because inspection of the cars before they left the Waukegan yards revealed that a draft key was missing on IC 19435. Counsel appears to argue that since the inspection had revealed that a draft key was missing, it should also have shown a cotter key holding a bleeder rod was about to give out.

Petitioner cites no authority in support of his argument and it is completely at variance with his own evidence. Petitioner proved that bleeder rods will become

disconnected when the cotter keys connecting them to the tank wear out from vibration or rust. When this happens, a hard pull on the bleeder rod will break the connection. Plaintiff's witness, O'Hara, testified that a routine inspection will *not* tell whether a cotter key is about to give out, and that the customary precaution to avoid cotter key breakage is an annual inspection, such cotter keys being ordinarily good for at least a year (R. 110-111).

Petitioner made no effort to show that even the most minute inspection prior to the time the train left the Waukegan yard would have revealed that a cotter key was about to give out. The only inference which can be drawn from the fact that the crew members walking along each of the ten freight cars observed no protruding bleeder rod (R. 57-8; 75-6; 106) is that no cotter key had broken prior to that time. On this evidence the only proper conclusion is that reached by the Court of Appeals that "nothing, in short, appears from which it might be inferred that the defendant knew or reasonably should have known that the cotter pin was defective."

Petitioner implies that this logical and common-sense conclusion constitutes a new definition of negligence. Actually it merely applies the controlling Illinois authority. In *Chicago & E. I. R. R. Co.* v. *Reilly*, 212 Ill. 506, 72 N.E. 454, plaintiff claimed to have been struck and injured by a piece of timber projecting from a freight car in defendant's train. Plaintiff proceeded on the theory that the car had been negligently loaded, and that the train had been so carelessly managed that a piece of timber was caused to project. A verdict and judgment for the plaintiff were reversed when the Supreme Court held that negligence was not proved, inasmuch as the condition of the timber could have been as readily accounted for on the

hypothesis of pure accident as upon the ground of negligence, and that there was no showing that the defendant had or should have had notice that the timber was projecting. At page 510 of the official report, the Court stated the Illinois rule to be:

> "The rule is well settled that negligence cannot be presumed where nothing is done out of the usual course of business unless that course itself is improper."

That the *Reilly* case enunciates Illinois law with respect to this issue is confirmed by its subsequent history. After the Supreme Court reversal, the case was retried. On the second trial plaintiff proceeded solely on specific charges of negligence. On substantially the same evidence plaintiff obtained another verdict and judgment. On the second appeal, *Chicago Title & Trust Company, Administrator,* v. *Chicago & E. I. R. R. Co.,* 167 Ill. App. 231, the Appellate Court reversed without remanding, holding that negligence had not been proved. The Supreme Court affirmed this decision (255 Ill. 294, 99 N. E. 634). *Franklin* v. *Missouri K. & T. Ry. Co. of Texas* (Tex. Civ. App.), 221 S.W. 2d 918, *Bradley* v. *Lake Shore & M. S. Ry. Co.,* 238 Pa. 315, 86 A. 200, and *Musto* v. *Lehigh Valley R. R.,* 327 Pa. 35, 192 A. 888, all follow the rule stated in the *Reilly* case.

II.

The Court of Appeals correctly applied the established principles of Illinois law governing res ipsa loquitur.

The petition contains three errors concerning the applicability of *res ipsa loquitur* to this case. At page 12 petitioner erroneously assumes that the applicability of the doctrine is an evidentiary question to which Rule 43(a) of the Federal Rules of Civil Procedure applies. Application of the doctrine of *res ipsa loquitur* is determined by the state authorities in a diversity case. *White* v. *United States* (9th Cir.), 193 F. 2d 505; *Woodworkers Tool Works* v. *Byrne* (9th Cir.), 191 F. 2d 667; *Matsumoto* v. *Chicago & N. W. Ry. Co.* (7th Cir.), 168 F. 2d 496, 499; *Ramsel* v. *Ring*, 173 F. 2d 41. After this assumption petitioner cites *I. C. R. R. Co.* v. *Bailey*, 222 Ill. 480, 70 N.E. 833, and *Chicago City Ry. Co.* v. *Pural*, 224 Ill. 324, 79 N.E. 686, for the proposition that whether a *prima facie* case established by *res ipsa loquitur* is rebutted by defendant is a question for the jury. These authorities are inapplicable, since they presuppose the applicability of *res ipsa loquitur*. The applicability of the doctrine in the first instance is a question of law. *Chicago Union Traction Co.* v. *Newmiller*, 215 Ill. 383, 74 N. E. 410; *New York, Chicago & St. Louis R. Co.* v. *Blumenthal*, 160 Ill. 40, 43 N. E. 809. Likewise petitioner assumes that the only basis for the Court holding that this doctrine was inapplicable was that specific negligence had been charged, and evidence presented in support thereof. Petitioner ignores the express finding of the opinion that petitioner had explicitly declined to rely on this doctrine prior to the rendition of the opinion. It is well recognized that an issue may not be raised for the first time upon rehearing in the Court of Appeals, *Marion Steam Shovel Co.* v. *Bertino* (8th Cir.), 82 F. 2d 945;

General Insurance Co. v. *Pathfinder Petroleum Co.* (9th Cir.), 145 F. 2d 368; *W. E. Hedger Transportation Corp.* v. *Ira S. Bushby & Sons* (2d Cir.), 155 F. 2d 321, 325. Certainly if new grounds cannot be set up in support of a petition for rehearing, they ought not be considered by this Court when it is asked to grant discretionary review for the purpose of correcting an allegedly gross error of the court below.

Independent of the foregoing objections, it is clear that under Illinois law *res ipsa loquitur* does not apply. The law is well stated in *Chicago & Eastern Ill. Ry. Co.* v. *Reilly*, 212 Ill. 506, where the Court said, at page 510:

> "The condition can be accounted for as readily on the hypothesis of pure accident and absence of negligence as upon the ground of negligence, and the rule is well settled that negligence cannot be presumed where nothing is done out of the usual course of business unless that course itself is improper."

The reasons why the *Reilly* case governs this issue as well, are well stated in the Court of Appeals' opinion. The *Reilly* case has been subsequently cited with approval by the Illinois Supreme Court in *Bollenbach* v. *Bloomenthal*, 341 Ill. 539, 173 N. E. 670. At page 545 of that opinion the court specifically affirms the holding of the *Reilly* case to the effect that where the condition can be accounted for as readily on a hypothesis of pure accident as upon the grounds of negligence, *res ipsa loquitur* does not apply.

The rule as to the applicability of *res ipsa loquitur*, as stated by the Illinois Supreme Court in the *Reilly* and *Bollenbach* cases was followed by the Seventh Circuit in *Omaha Packing Co.* v. *Pittsburgh, F. W. & C. Ry. Co.*, 120 F. 2d 594. There the evidence established that fire damage resulted from a failure of a bridge to rise, which in

turn was caused by the absence of a cotter key in the bridge mechanism. Numerous theories were advanced to account for the absence of this cotter key. The Court held that the doctrine of *res ipsa loquitur* was inapplicable, saying at page 601:

> "In addition to the reasons stated heretofore, we think the doctrine is inapplicable where it can be reasonably said that the absence of the cotter key was as consistent with ordinary care as with negligence. The fact is that it is far more reasonable, under the circumstances, to believe that the key was absent because of breakage occasioned by a latent defect, than any of the other possibilities suggested."

In the instant case, the train was inspected prior to its movement from the Waukegan yard, where the only defect discoverable was a missing draft key, which would not have caused the car involved to be taken out of service. The record does not show that the car from which the draft key was missing was the one on which petitioner testified he saw the protruding rod. Petitioner's own expert testified to a number of causes for cotter key failures on bleeder rod assemblies. He also testified that the possibility of such failures could not be discovered by routine inspection, and that customarily on the railroad upon which he was employed (not the respondent) an annual inspection was made to determine whether the cotter keys were in good condition. Petitioner offered no evidence that a defective cotter key would always be discovered by inspection or that annual inspections were not made. In view of the routine inspection preceding the movement of the train, the most logical hypothesis is that the cotter key had not snapped at the time the train moved, and that, if it snapped at all, it did so during the movement from the Waukegan yard. Since respondent would have had no opportunity to discover this, the occurrence falls into the cate-

gory of accident. The rule that *res ipsa loquitur* is inapplicable unless it is shown that the accident is one which would not occur if defendant used due care has been recently enunciated in the case of *Simmons* v. *South Shore Hospital,* 340 Ill. App. 153, 91 N.E. (2d) 135.

In the instant case the Court of Appeals also followed Illinois law in holding that evidence as to the specific cause of the accident was sufficient to avoid the application of the doctrine. In *Adamsen* v. *Magnelia,* 280 Ill. App. 418, 425, the rule is stated to be that if the evidence explains or shows the cause of the occurrence complained of, there is no room for the application of the doctrine of *res ipsa loquitur.* It is this principle which distinguishes *Wm. Wrigley, Jr. Co.* v. *Standard Roofing Co.,* 325 Ill. App. 210, 59 N. E. 2d 510, relied on at page 13 of the petition. In that case, the issue involved was whether or not the Roofing Company was liable for Workmen's Compensation to be paid by plaintiff to the widow of an employee who was killed when he was struck by a ladder which fell from the roof of one of plaintiff's buildings in the course of work being performed by the defendant. The complaint contained separate counts, some based on *res ipsa loquitur* and others on negligent placing of the ladder. It was admitted that the ladder was blown from the roof by a gust of wind. The Court held that since the cause of the accident had been shown, *res ipsa loquitur* was inapplicable (see p. 216 of the opinion).

In a later case, *Jackson v. 919 Corporation,* 344 Ill. App. 519, 528, 101 N.E. (2d) 594, the Court held that *res ipsa loquitur* did not apply where plaintiff had introduced evidence showing the specific cause of the accident. The Court ruled that on remand of the case the plaintiff could amend her complaint to include a charge of general negli-

gence, but that if she wished to stand on her charges of specific negligence, involving proof of a definite cause, she could not avail herself of the doctrine. From the *Jackson* case it is clear that these are not permissible alternatives under Illinois law, but that the introduction of evidence of the specific cause of the accident renders *res ipsa loquitur* inapplicable.

Even if the Court of Appeals misapprehended the impact of *res ipsa loquitur* in *Wadiak* v. *Illinois Central R. Co.* (7th Cir.), 208 F. 2d 925, that ruling would have no significance in the instant case, since the opinion herein is consistent with the govering Illinois decisions. Read in context, however, the portion quoted by the plaintiff shows that the doubt on the part of the Court as to the applicability of *res ipsa loquitur* in actions under the Federal Employers' Liability Act arises, not from any consideration of the provisions thereof, but from the practical fact that since actions thereunder are only brought against the carrier by its employees for injury in the course of their employment, plaintiffs are usually able to, and do, in fact, introduce evidence of specific negligence. The petition herein (ptn. 14-15) attempts to obscure the simple truth that the Court of Appeals studied the Illinois law of *res ipsa loquitur* and correctly applied it. Such being the case, whatever the Court of Appeals may have done in other litigation is entirely immaterial.

III.

Petitioner has shown no grounds for invoking the certiorari jurisdiction of this Court.

Even upon the hypothesis that error had been committed by the court below, it could only have consisted in drawing improper inferences from the facts in the record. As this court said in *General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, at page 178, "granting the writ would not be warranted merely to review the evidence or inferences drawn from it." The spirit in which certiorari jurisdiction is exercised was unmistakably indicated by the late Chief Justice Taft at page 163 of the opinion in *Magnum Co.* v. *Coty*, 262 U.S. 159, where he said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes, the first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred on this Court to give the defeated party in the Circuit Court of Appeals another hearing*" (emphasis supplied).

Unable to demonstrate the presence of any of the grounds for certiorari in the record and opinion in this case, yet desirous of obtaining another hearing, petitioner attempts to crowd this case into the category of cases in which this Court exercises its supervisory power. Counsel presents a collection of inaccurate citations purporting to show that the Court of Appeals misconceives its function. Accepted at the face value asserted by the petition, they would only show that the court fails to find a way for plaintiffs to recover in every personal injury case. Such failure is not a misconception of the

function of the reviewing court. Moreover, counsel's statistics are quite inaccurate. Appendix A to this petition contains a short resume of the cases cited at page 9 of the petition. The results demonstrate the inaccuracy of plaintiffs statement of what these cases purport to hold. Of the twenty-six there cited, only five decisions in favor of plaintiff were reversed on the grounds that there was no negligence shown (certiorari was denied in three). Six were reversed for failure to prove freedom from contributory negligence on the part of the plaintiff (certiorari being denied in two). Four were affirmances of directed verdicts entered in favor of defendants in the trial courts (certiorari was denied in two of these). Six were affirmances of judgments notwithstanding the verdict or judgments notwithstanding the failure of the jury to agree. Of the remainder, one was an affirmance of a jury verdict for the plaintiff; one was a reversal of a directed verdict for the defendant on the ground that there was evidence of negligence; one was reversed because of errors in instructions, the court also holding, however, that defendant's motion for a directed verdict was properly denied; and one affirmed the dismissal of complaint for failure to state a cause of action. One case was not related to negligence, but was determined on the ground that plaintiff's intestate was not a "seaman" under the Jones Act. Clearly, these results demonstrate the fallacy of petitioner's statistics. Moreover, petitioner omits fifteen cases reported in these same volumes in which the Court of Appeals for the Seventh Circuit affirmed judgments in favor of plaintiffs, and six cases in which judgments for defendants were reversed.

The relevancy of petitioner's argument with respect to the attitude of the Court of Appeals for the Seventh

Circuit compared with the Illinois courts toward large verdicts is not apparent (Ptn. 9-10). There is no indication that the Court of Appeals considered the verdict in this case to be so large as to require it to scan the record more closely for error.[1]

Moreover, this claimed discrepancy between the Illinois courts and the federal courts is much at variance with a petition for rehearing filed by petitioner's counsel in another case entitled *Olson* v. *Chicago Transit Authority*, 1 Ill. 2d 83, 115 N.E. 2d 301, in which, on the basis of a similar type of statistical comparison, he vehemently complained of the bias exhibited by the First Division of the First District of the Appellate Court of Illinois. At page 17 of this petition, counsel said:

> "The cold hard fact of the matter is that the public is being constantly penalized by this Division of the Court because he might seek a remedy in court of law. Today, as the *Hall* case (*Hall* v. *Chicago & North Western Ry. Co.*, 349 Ill. App. 175), the *Lees* case (*Lees* v. *Chicago & North Western Ry. Co.*, 409 Ill. 536), and this case well demonstrate the quest of a remedy is a project of a lifetime. • • • What we have said, we assure this court, has no personal basis. Nor is it a question of losing a case. The issue is far greater. It is: How long must the public suffer trials *de novo* when their cases are assigned to this Division of the Appellate Court?"

Counsel's criticism of the Court of Appeals for the Seventh Circuit is not new to this Court. *In Spikings* v. *Wabash R. Co.*, 201 F. 2d 492, cert.den. 345 U. S. 992, this

---

[1] The case referred to by counsel for the petitioner as *Martinez* v. *Chicago and North Western Ry. Co.* is actually the case of *Martinez* v. *Chicago Great Western Ry. Co.* The settlement made in that case obviously would have no bearing herein.

same counsel charged that the Seventh Circuit wrongfully adopted the general practice of weighing the evidence in personal injury cases. This contention met with a well deserved denial of certiorari. Although respondent recognizes the proper significance to be attached to such a denial, we submit that the same result should obtain here, particularly since many of the cases which counsel submits as evincing this tendency have been unsuccessfully presented to this court on petition for certiorari.

Conclusion.

No basis for reversal of the opinion of the Court of Appeals in this case exists. The decision is clearly supported by controlling Illinois decisions which were properly applied to the facts as they appeared on the record. Much less is a basis for certiorari shown, since the only issue which could possibly be presented would be one involving further review of the evidence as measured against the same Illinois decisions. Recognizing this, petitioner's counsel has fallen back upon his usual tactics of asserting bias and incompetence on the part of the reviewing tribunal. He has done so on the basis of an erroneous and inaccurate pseudo-statistical study.

For the above and foregoing reasons we respectfully submit that the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is without merit, and should be denied.

Respectfully submitted,

Otis Lowell Hastings,
Drennan J. Slater,
Gerald M. Chapman,
Attorneys for Respondent.

APPENDIX A.

Synopsis of cases cited by petitioner as being reversals of judgments for plaintiff.

At pages 8 and 9 of the petition it is claimed that twenty-six cases, resulted in reversals of judgments for plaintiffs in the Court of Appeals for the Seventh Circuit on the ground that there was not sufficient evidence of negligence to take the case to the jury. The actual basis of decision in these cases is indicated below.

Cases in which judgments for plaintiffs were reversed because of insufficient evidence of negligence.

Wendell v. *Chicago, R. I. & P. R. Co.*, 184 F. 2d 868.

O'Keefe v. *Wabash R. R. Co.*, 185 F. 2d 241 cert den., 341 U. S. 921.

Ernst v. *Jewel Tea Co.*, 197 F. 2d 881, cert den., 344 U. S. 918. (Miscited as 197 F. 2d 88.)

Repsholdt v. *United States*, 205 F. 2d 852, cert. den., 346 U. S. 901. (Miscited as *Repshodt* v. *United States.*)

Wadiak v. *Illinois Central R. Co.*, 208 F. 2d 925.

Cases reversed on the ground that plaintiff failed to prove freedom from contributory negligence, or because contributory negligence as a matter of law was established by the record.

Cox v. *Kroger*, 179 F. 2d 382. (An automobile accident case in which the Court also found that there was evidence from which the jury could have found negligence.)

Hoff v. *Donaldson*, 184 F. 2d 419.

Reynolds v. *Baltimore & O. R. Co.*, 185 F. 2d 27, cert. den., 340 U. S. 947.

Appendix.

Ackermann v. *Hicks*, 193 F. 2d. 345. (A judgment for plaintiff against one defendant was affirmed. Reversal, on the ground of contributory negligence, was on a cross-claim between two of the defendants.)

Spikings v. *Wabash R. Co.*, 201 F. 2d 492, cert. den., 345 U. S. 992. (A crossing case in which plaintiff was guilty of contributory negligence as a matter of law. Plaintiff therein was represented by the same counsel as the one representing petitioner in this case.)

Barrett v. *Chicago & N. W. Ry. Co.*, 207 F. 2d 5.

Cases in which directed verdicts for defendants were affirmed.

Billman v. *Kroger Co.*, 185 F. 2d 120.

Griffy v. *Havey*, 201 F. 2d 501. (Miscited as *Guffey* v. *Havey*.)

Wetherbee v. *E. J. & E. Railroad Co.*, 204 F. 2d 755, cert. den., 346 U. S. 867.

Petermichl v. *Chicago & N. W. Ry. Co.*, 205 F. 2d 434, cert. den., 346 U. S. 916.

Cases in which judgments notwithstanding verdicts or disagreements of juries were affirmed.

Swigart v. *Chicago & N. W. Ry. Co.*, 180 F. 2d 177.

Quirk v. *New York, C. & St. L. R. Co.*, 189 F. 2d 97, cert. den., 342 U. S. 871. (The basis of decision was that an employee going home on one of the railroad's motor cars was not engaged in employment under the F. E. L. A. at the time of the accident.)

McGunegill v. *Chesapeake & O. Ry. Co.*, 199 F. 2d 302.

Reilly v. *Chicago & N. W. Ry. Co.*, 201 F. 473, cert. den., 345 U. S. 997. (Whether the municipal authorities had served the notice to fence required by the ordinance on which plaintiff relied?)

Appendix.

Koch v. *Chicago & N. W. Ry. Co.*, 208 F. 152.

Stephens v. *Sears, Roebuck & Co.*, 212 F. 2d 260. (Miscited as *Stevens* v. *Sears, Roebuck & Co.*, 211 F. 2d 260.)

Miscellaneous cases not determined on the basis of failure to prove negligence.

Desper v. *Starved Rock Ferry Co.*, 188 F. 2d 177, affirmed, 342 U. S. 187, reh. den., 342 U. S. 934. (The basis of the decision was that plaintiff's intestate was not a "seaman" under the Jones Act.)

Schroeder v. *Minneapolis, St. Paul & S. S. M. R. Co.*, 204 F. 2d 758. (A case in which no verdict was involved, since the trial judge dismissed the complaint and plaintiff elected to stand on the complaint.)

Hill v. *Railway Express Agency*, 187 F. 2d 184. (Refusal to direct a verdict for the defendant affirmed. Reversal was on the ground of errors in instructions. Mr. Dooley represented the plaintiff.)

Heller v. *Select Lake City Theatre Co.*, 187 F. 2d 649. (Directed verdict for the defendant reversed on the grounds that there was evidence of negligence.)

Fiedler v. *Chicago & N. W. Ry. Co.*, 204 F. 2d 515. (A jury verdict for the plaintiff was affirmed by the Court of Appeals.)

Cases Favorable to Plaintiffs.

At page 9 of the petition four cases are listed as being affirmances of judgments for plaintiffs. One of these, *Nattens* v. *Grolier Society*, 195 F. 2d 449, was actually a reversal of a judgment n.o.v., entered by the trial court in favor of the defendant. In addition to the *Fiedler* and *Heller* cases, which should have been included in this

category rather than among the twenty-six cases cited as being favorable to the defendant, judgments for plaintiffs were affirmed in the following cases during the period covered by Mr. Dooley's survey:

Hynes v. *Indian Trails*, 181 F. 2d 668, cert den., 340 U. S. 824.

Plummer v. *Spence*, 182 F. 2d 958.

Leach v. *Maryland Casualty Co.*, 183 F. 2d 43.

Mead v. *Cochran*, 184 F. 2d 579.

McGilvray v. *Powell 700 North*, 186 F. 2d 909.

Reeder v. *Tosh*, 187 F. 2d 10.

Frazier v. *Sims Motor Transport Lines*, 196 F. 2d 914.

Stewart v. *United States*, 199 F. 2d 517.

Pearson v. *Baltimore & Ohio R. Co.*, 200 F. 2d 569.

Koehler v. *U.S.*, 200 F. 2d 588.

Tillman v. *Great American Indemnity Co. of New York*, 207 F. 2d 588.

Carter v. *John Henner Trucking Co.*, 210 F. 2d 443.

Norling v. *Carr*, 211 F. 2d 897.

Petitioner's counsel also neglects to cite the following cases in which judgments for defendants were reversed:

Desch v. *United States*, 186 F. 2d 623.

Stewart v. *United States*, 186 F. 2d 627, cert. den., 341 U. S. 940.

Mattison v. *Brown*, 197 F. 2d. 414.

Drinan v. *A. J. Lindemann & Hoverson Co.*, 202 F. 2d 271.

Colas v. *Grzegorek*, 207 F. 2d 705.

Grivas v. *Parmelee Transp. Co.* 207 F. 2d 334, cert. den., 347 U. S. 913.

Heller v. *Select Lake City Theatre Co.*, 187 F. 2d 649.

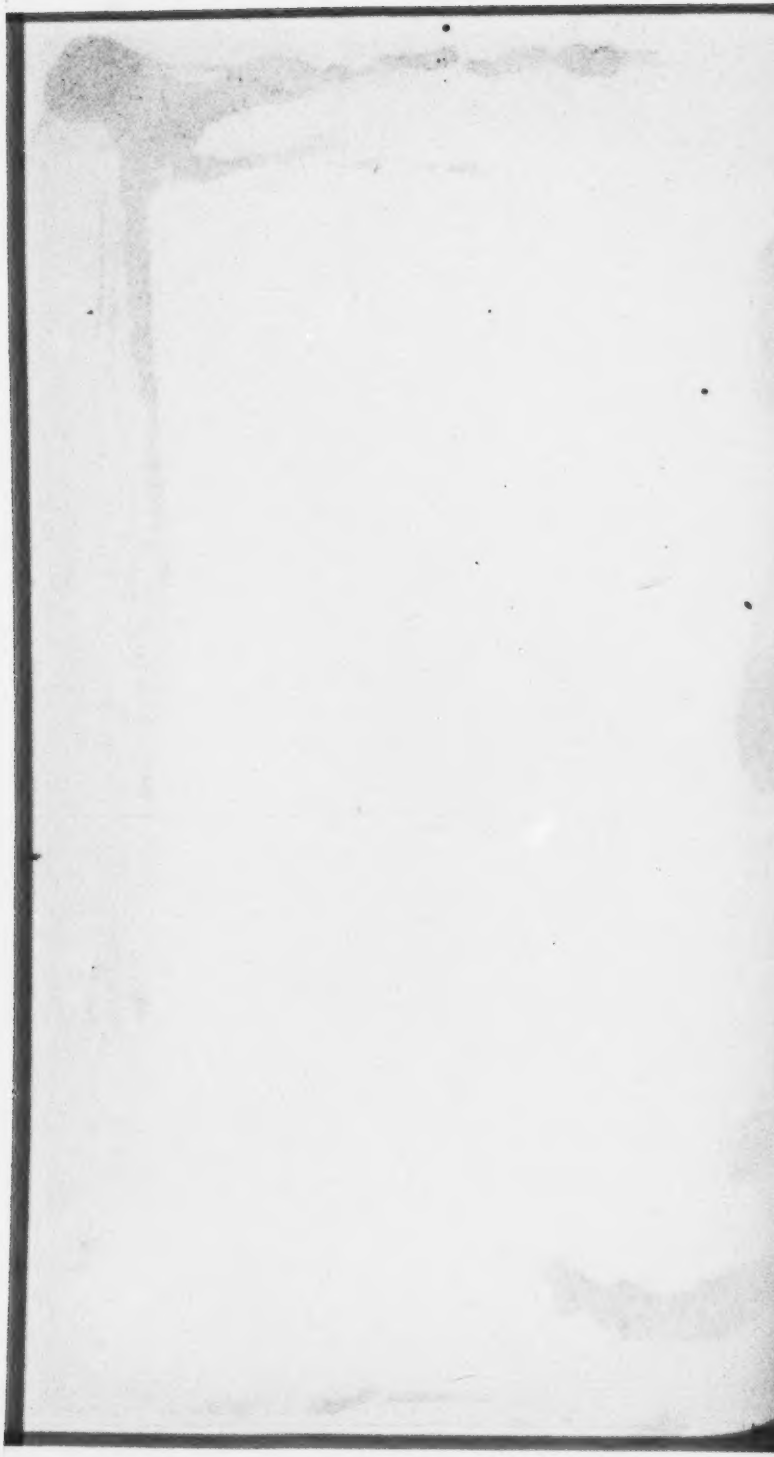
APPENDIX B.

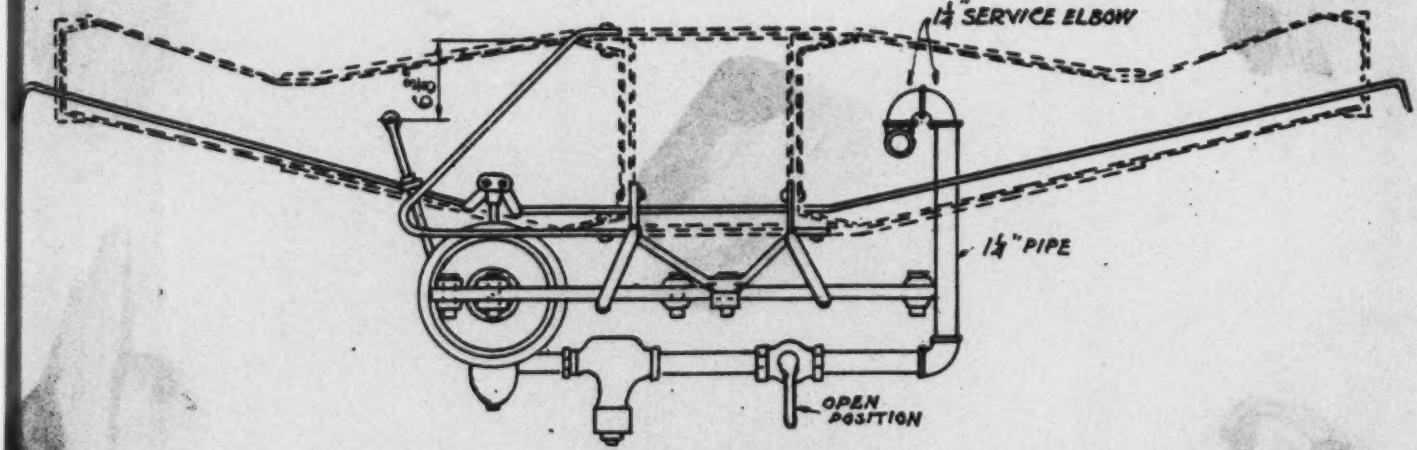
Reproduction of Defendant's Exhibits.

The exhibits contained herein are reproduced in the following order.

Defendant's Exhibit 7, a photograph showing the lower portion of the side of a box car.

Defendant's Exhibit 16, reproduction of a portion of a blueprint showing the cross bearer section under a box car.





SECTION AT CROSSBEARER